Understanding the Hunstein decision's impact on debt collection

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An 11th U.S. Circuit Court of Appeals case has left the debt collection world on pins and needles for a year wondering if a ministerial part of their business practice was suddenly a violation of the Fair Debt Collection Practices Act (FDCPA). For years, it was common practice to share consumer debt information with third-party mail vendors to send collection letters, but one ruling threw that all into chaos.

In Hunstein III*, guided by Supreme Court cases including* TransUnion*, the court held the alleged harm — a disclosure to a private party — was not similar to the analogous harm cited, disclosure to the public.*

Through a series of appeals, the final outcome of the *Hunstein v. Preferred Collection* action has been reached and the hand-wringing is over, for now. But the extent of its impact is yet unknown. A look at the long and winding road to resolution in favor of debt collectors underscores how tenuous the current state of the law is and the potential for plaintiffs to bring claims that would avoid its reach.

Those involved in collection activities should take heed of the potential legal exposure.

Case background

Plaintiff Richard Hunstein's hospital medical debt was assigned to a debt collection agency, Preferred Collection and Management Services, which then hired a commercial mail vendor to notify Hunstein of his debt obligation. In connection with the debt, the collection agency transmitted to the vendor Hunstein's name, his son's name, the amount of the debt, and the fact that the debt was incurred due to his son's medical treatment.

In 2019, Hunstein sued over this disclosure of his debt as a violation of the FDCPA. The crux of the action was whether certain shared data between debt collectors and their third-party vendors was an actionable violation of law.

The District Court granted the defendant's motion to dismiss, but a series of appeals ensued, causing trepidation in the debt collection world for the past year.

Legal standing

The threshold question in *Hunstein* was whether the alleged violation of the FDCPA gave rise to a concrete injury in fact such that plaintiff had an actionable claim in federal court (a court vested with power under Article III of the U.S. Constitution).

As an initial matter, the mere claim of a violation of federal statute is not sufficient to grant the right to sue in federal court. As the Supreme Court has held in *TransUnion LLC v. Ramirez* in 2021, to have standing in federal court under Article III a concrete injury is required, even in the context of a statutory violation. The Supreme Court ruled "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."

Courts will assess intangible injuries, the type alleged in *Hunstein*, by considering if they bear "a close relationship" to harms traditionally recognized as actionable by U.S. courts, as guided by the Supreme Court in *Spokeo, Inc. v. Robins* in 2016. Usually, the courts are looking for analogous related harms.

First appeal

In *Hunstein v. Preferred Collection and Management Services* ("*Hunstein I*") on appeal, in August 2021, the 11th Circuit panel reversed, finding there was in fact a concrete injury to confer Article III standing. The court ruled the transmittal of the consumer's debt information to the vendor was a "communication" "in connection with the collection of any debt" and therefore prohibited under the FDCPA.

The *Hunstein I* panel analogized Richard Hunstein's alleged intangible harm to actionable torts such as invasion of personal privacy and public disclosure of private facts. In the court's view, Congress had intended the FDCPA to similarly protect against invasions of individual privacy. Therefore, Hunstein had standing to sue on this related harm.

A substitute opinion

Later in 2021, the 11th Circuit panel vacated and substituted its opinion ("*Hunstein II*") in light of the Supreme Court decision in *TransUnion v. Ramirez*, where the Supreme Court had dealt directly with the issues of standing, intangible harm and concrete injury.

In *TransUnion*, plaintiffs had sued under the Fair Credit Reporting Act for TransUnion's failure to ensure the accuracy of their credit files. There, the issue of standing of the class members turned on whether their "misleading credit reports" had been provided "to third-party businesses." If so, it would establish a concrete injury bearing a close relationship to the common-law tort of defamation, and thus concrete injury sufficient for Article III standing.

In contrast, those class members whose credit reports had not been provided to third parties would not have standing.

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In a footnote, the Supreme Court in *TransUnion* directly addressed the plaintiffs' argument that TransUnion's transmittal of customer credit information to a vendor that printed and sent mailings was a "publication" under defamation law. The Supreme Court found this argument "unavailing" as courts have not generally "recognized disclosures to printing vendors as actionable publications....and does not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing."

The 11th Circuit panel in *Hunstein II* was not deterred by this footnote, however, referring to it as dicta and again finding Richard Hunstein had standing to pursue his claim.

En banc review

Following a majority vote to rehear the matter *en banc*, in September 2022, the 11th Circuit in an 8-4 decision, "*Hunstein III*," determined that Hunstein did not have standing.

In *Hunstein III*, guided by Supreme Court cases including *TransUnion*, the court held the alleged harm — a disclosure to a private party — was not similar to the analogous harm cited, disclosure to the public. That traditional tort requires publicity, which was not alleged by Hunstein. Given that none of the exposure targeted by the tort of public disclosure was at issue, Hunstein failed to allege a concrete harm.

Future of *Hunstein*

It's possible we have not seen the end of *Hunstein*. The *Hunstein III* decision was not unanimous, and Richard Hunstein could appeal to the Supreme Court or even refile in state court. Further, many copycat cases were filed on the heels of *Hunstein I*.

Based on *Hunstein III* and *TransUnion*, actions filed in federal court may have significant challenges. On the other hand, the several rounds of *Hunstein* have given plaintiffs an opportunity to improve their pleadings. These cases will need to be monitored by debt collectors in their jurisdictions of operation. Most significantly, state cases can still be pursued, and these cases may reach the issue on its merits (given the absence of the standing issue central to an action in federal court).

Potential for regulatory action

The Consumer Financial Protection Bureau (CFPB) is well aware that many debt collectors rely on letter vendors for their mailings and has not expressed concern.

In the notes of the Regulation F, the most recent update to the debt collection rules, the CFPB remarked that "over 85 percent of debt collectors surveyed by the Bureau reported using letter vendors."

Further, the CFPB's comments to Section 1026.34 of Regulation F mention that one of the appropriate addresses a debt collector could provide for accepting disputes and requests for original-creditor information is the vendor's mailing address.

It would be surprising with this very open and apparent history that the bureau would suddenly question this long-standing practice.

Conclusion

At this point, the use of vendor letters is looking like a safer practice than it did last year, but the legal landscape may continue to evolve. With regulators staying on the sidelines, debt collectors must watch for any further developments in the law in federal and state court.

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